2013 IL App (2d) 130219-U
No. 2-13-0219
Order filed September 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIFTH THIRD MORTGAGE COMPANY, Plaintiff-Appellee, v. MARINA AKOPIAN, Defendant-Appellant (Unknown Owners and Nonrecord Claimants, Defendants; Right Residential Series 1, LLC, Intervenor-Appellee).	)	Appeal from the Circuit Court of Lake County. No. 11-CH-4060 Honorable Luis A. Berrones, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Without an official account of the relevant hearing, we could not say that the trial court abused its discretion in denying defendant's motion to vacate a foreclosure judgment.

¶ 2 Marina Akopian, the property-owner defendant in a foreclosure action, appeals the court's denial of her motion to vacate the foreclosure judgment and the confirmation of the judicial sale of the property. Because the record is insufficient to support Akopian's claim of error as to the denial

of the motion to vacate and because she has no separate basis for challenging the confirmation, we affirm both.

¶ 3 I. BACKGROUND

¶ 4 On September 7, 2011, plaintiff, Fifth Third Mortgage Company (FTMC), filed a foreclosure suit relating to a mortgage on the property at 653 Buckthorn Terrace in Buffalo Grove. Akopian was the only named defendant. FTMC stated that the capacity in which it sued was as the mortgagee and holder of the note; the attached copy of the mortgage and note was consistent with this claim. On September 6, 2012, the court entered an order of default against Akopian and an order of foreclosure. That judgment did not contain a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 5 Akopian filed a motion to vacate the default on December 10, 2012. She noted the absence of a final order, invoked section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/1-1301 (West 2012)), and stated that she had defenses, "including Plaintiff being precluded from filing as it is not a registered debt collector and also lack of standing." She asserted that Freddie Mac was the mortgage's owner; with the motion, she included a printout from the Freddie Mac website showing that, when she entered her name and address, the site reported that Freddie Mac was the owner. Also included was a proposed answer in which Akopian asserted that Freddie Mac acquired the note and mortgage on May 13, 2010, so that (1) FTMC was acting as a debt collector without proper registration and (2) FTMC lacked standing to bring the action.

¶ 6 On December 27, 2012, before FTMC responded to Akopian's motion, Right Residential Series 1, LLC, moved for confirmation of the judicial sale. It asserted that the sale had taken place

on December 11, 2012, and that it, a third party, had been the successful bidder. It also filed a petition to intervene, which the court granted.

¶ 7 With the motion to confirm the sale still pending, FTMC responded to the motion to vacate the default. It asserted, among other things, that under section 2.03 of the Collection Agency Act (Act) (225 ILCS 425/2.03 (West 2010)) banks and lending companies are specifically exempted from the restrictions on collection activities set out in the Act.

¶ 8 Akopian replied, asserting, among other things, that FTMC is not Fifth Third Bank and is not itself a bank, and that, under the holding in *LVNV Funding, LLC v. Trice*, 2011 IL App (1st) 092773, a judgment in an action brought by an unregistered collection agency is void.

¶ 9 The court confirmed the sale on January 25, 2013. It denied the motion to vacate the default the same day, "the Court having reviewed the pleadings and heard argument."

¶ 10 On February 25, 2012, a Monday, Akopian filed a motion to reconsider. She filed a notice of appeal the same day. On March 14, 2013, the court struck the motion to reconsider. The record on appeal does not contain any reports of proceeding or substitutes for such reports.

¶ 11 II. ANALYSIS

¶ 12 Akopian's brief is unclearly written. She undoubtedly asserts that the court erred when it denied her motion to vacate the default. Beyond that, the gist of her argument seems to be an assertion that, when a court vacates a default, a defendant may raise any defenses that the law would have allowed him or her to raise in a completely timely answer. Concerning the claim that FTMC is an unregistered collection agency, she seemingly argues that, because "[t]here is no case law whatsoever that states that to obtain an order vacating a default under 2-1301 the Defendant must prove his case," she need not respond to FTMC's argument that that defense fails as a matter of law.

She asserts that "there is also an issue regarding whether," under *Trice*, the judgment is void because FTMC is an unregistered collection agency.

¶ 13 Akopian, citing *Bank & Trust Co. v. Line Pilot Bungee, Inc.*, 323 Ill. App. 3d 412, 415 (2001), argues that precedent supports three possible standards of review for the disposition of a motion to vacate a default judgment: (1) abuse of discretion, (2) whether substantial justice was done between the litigants, and (3) a combination of the two. She urges use of the combined standard.

¶ 14 The result here is largely dictated by the principles of *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984): "in the absence of *** a record on appeal [sufficiently complete to support the claim of error], it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis," and "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." As we explain, the absence of any reports of proceedings requires us to presume that the court had a proper rationale for concluding that trial on the merits would be unreasonable. However, because Akopian suggests that, under the Act, judgment in favor of FTMC was wrong as a matter of law, we consider whether the record supports the assertion that FTMC was an unregistered collection agency. We conclude that, given the limited information about FTMC in the record, it does not. We therefore hold that the record does not support Akopian's claim of error; thus, we affirm.

¶ 15 Initially, however, we clarify the standard review, as we cannot apply *Foutch* principles clearly when the standard of review is vague. Only one standard of review exists for the disposition of a motion to vacate: abuse of discretion. To be sure, a prominent line of cases, starting with *Venzor v. Carmen's Pizza Corp.*, 235 Ill. App. 3d 1053, 1056-57 (1992), accepts the combined standard: "a trial court's refusal to vacate a default judgment may be reversed because of a denial

of substantial justice *or* because of an abuse of discretion." (Emphasis in original.) (*Line Pilot Bungee* recapitulates *Venzor*'s analysis.) As subsequent supreme court precedent shows, this standard conflates the "substantive standard" (*In re Haley D.*, 2011 IL 110886, ¶ 57), applicable to a motion to vacate a nonfinal judgment, with the standard of review.

¶ 16 In *Haley D.*, the supreme court, specifying the substantive standard applicable to a motion to vacate a nonfinal judgment, stated that "the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." *Haley D.*, 2011 IL 110886, ¶ 57. Further, "section 2-1301(e) provides that the decision as to whether the default should be set aside is discretionary," but "[w]hen a court is presented with [such] a request *** the overriding consideration" is the substantive standard already stated. *Haley D.*, 2011 IL 110886, ¶ 69. In other words, the trial court must apply the substantive "substantial justice" standard; this court uses the abuse-of-discretion standard when it decides whether the trial court was correct in doing so.

¶ 17 As for the abuse-of-discretion standard itself, case law states it in several essentially similar ways. "A trial court has abused its discretion when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted." *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999). "We may find an abuse of discretion only where no reasonable person would take the position adopted by the trial court; that is, where the trial court acted arbitrarily or ignored recognized principles of law." *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548-49 (2008). An indefensible result is thus an abuse of discretion. However, a potentially defensible result achieved in an unconsidered or improperly considered manner—by means of a bad rationale—is also an abuse

of discretion. For instance, a "trial court's refusal to exercise its discretion due to its belief that it has none is error." *Allstate Insurance Co. v. Rizzi*, 252 Ill. App. 3d 133, 137 (1993).

¶ 18 For a reviewing court to have a basis to find an abuse of discretion based on a bad rationale, it must have a full record of the court's statement of its rationale. This is a corollary of the rule in *Foutch*. We do not presume a bad rationale; the record must show it. Here, the record is incomplete in that it contains no reports of proceedings or substitutes for such reports; the record, as it stands, tells us nothing of the court's rationale. Therefore, Akopian cannot assert that the court used an improper rationale.

¶ 19 *Foutch* principles also defeat the remaining aspects of Akopian's claim of error. First, "*[a]ll* events leading up to the judgment must be assessed in considering whether substantial justice is being done." (Emphasis in original.) *Haley D.*, 2011 IL 110886, ¶ 72. The wording of the court's ruling implies that this was not an evidentiary hearing. That, however, does not mean that nothing could have happened at the hearing to support the court's ruling. Commonly, attorneys make representations to the court about how they and their clients came to act as they did. We have no way to know what the attorneys told the court here. We need not imagine that such representations contained lightning-bolt revelations to conclude that our lack of full knowledge prevents us from making a proper judgment on the merits. In particular, the matters raised by the motion invited clarifications that were likely to have come by attorney representations or judicial notice. Most notably, the web page printout that suggested that Freddie Mac owed Akopian's mortgage begged for further explanation. Again, there is too much we do not know for us to say that the court erred in denying the motion.

¶ 20 Akopian asserts that FTMC is an unregistered collection agency—a claim that, if true, would, under *Trice*, put the entire judgment's validity in question. However, the Act specifically exempts businesses for which the need for debt collection naturally arises in the course of business. In particular, it fully exempts banks and loan companies:

> "This Act does not apply to persons whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency, *and specifically does not include the following*:
>
> 1. Banks, including trust departments, affiliates, and subsidiaries thereof, fiduciaries, and financing and lending institutions (except those who own or operate collection agencies);
>
> * * *
>
> 8. Loan and finance companies[.]" (Emphasis added.) 225 ILCS 425/2.03 (West 2010).

Akopian argues that FTMC is not a bank. She does not explain why it is not a loan or finance company or other business whose need to collect debt relates to its own regular operations. Based on its name, we expect that FTMC is in the business of making mortgage-based loans such that it would fall under the exception of section 2.03. Akopian has given us no evidence or argument to suggest a different conclusion. The trial court might have learned more, but, under *Foutch* principles, we must assume that anything it learned supported its ruling.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the denial of Akopian's motion to vacate and the confirmation of the judicial sale that followed from that denial.

¶ 23 Affirmed.